

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

75-1202

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

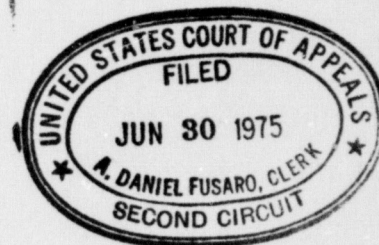
DELORIS E. CANTY,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANT, DELORIS E. CANTY

LEONARD H. KAPLAN
Attorney for Appellant
44 Court Street
Brooklyn, New York 11201
Tel. No. UL 8-3718



(4821B)

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Cases Cited.....	ii
Statement of the Issues.....	iii
Preliminary Statement.....	1
Facts.....	2
 POINT I	
THE COURT'S COMMENT IN ITS CHARGE TO THE JURY UPON A PORTION OF THE DEFENDANT'S COUNSEL'S SUMMATION CONSTITUTED ERROR SINCE IT TENDED TO DEPRIVE THE DEFENDANT OF AN ADJUDICATION BY THE JURY OF HER GUILT OR INNOCENCE UPON ALL THE EVIDENCE IN THE CASE, NOT JUST UPON A PORTION OF IT.....	
	9
 POINT II	
THE SENTENCE IMPOSED UPON THE DEFENDANT WAS EXCESSIVE.....	
	17
 CONCLUSION.....	
	21

TABLE OF CASES CITED

	Page
<u>Quercia v. U.S.</u> , 289 U.S. 466.....	14
<u>Billeci v. U.S.</u> , 194 F2d 394.....	14
<u>U.S. v. Murdock</u> , 290 U.S. 389.....	15
<u>U.S. v. Woods</u> , 252 F 2d 334.....	15
<u>Wallace v. U.S.</u> 291 F2d 972.....	15
<u>Cook v. U.S.</u> 18 F 2d 50.....	15
<u>Stevens v. U.S.</u> 305 F2d 834.....	15
<u>Myers v. George</u> , 271 F 2d 168.....	15

STATEMENT OF THE ISSUES

Whether the conviction of the defendant must be reversed (1) - because of error in the Court's charge to the jury and (2) - because the sentence imposed upon her was excessive.

PRELIMINARY STATEMENT

Appellant was indicted in the United States District Court for the Southern District of New York, under Indictment # 74 CR 1161. The indictment contained three (3) counts.

The first count charged Appellant with embezzling TWENTY THOUSAND THREE HUNDRED and 00/100 (\$20,300.00) DOLLARS in cash on November 12, 1974 from her employer, CENTRAL STATE BANK (Title 18, U.S. Code, Section 656). Count Two (2) charged the Appellant with making false entries in the Bank's records on November 12, 1974 in violation of Title 18, U.S. Code, Section 1005. In Count Three (3), Appellant was accused of making a false entry in a report and statement of the Bank on November 19, 1974 in violation of Title 18, U.S. Code 1005.

FACTS

On November 20, 1974, a "surprise cash count" was conducted at the CENTRAL STATE BANK where defendant was one of the Bank's 3 tellers. The auditors conducting the cash count determined that there was a shortage of \$20,300.00 in cash. The auditors then proceeded to try to locate the missing cash and the reason for the shortage. Documentary evidence in the case led them to the conclusion that defendant must have taken that money. She was arrested and after trial on April 7 and 8, 1975, she was convicted. On May 20, 1975, she was sentenced to 4 years and payment of \$5,000.00 fine on each of the 3 counts, the prison sentences to run concurrently.

TESTIMONY OF JOE BUNNICELLI

This witness testified that he had been employed at the Bank for 7 months and that he was its head teller. Prior to that he worked as a teller for a savings bank for about 3 years. A teller at a savings bank performs different duties from those of a commercial bank. (Transcript p . 186). He did not steal \$20,300.00 from anyone's cash on November 12 or November 19. (p.186): 3 tellers were employed at the Bank on November 19, 1974, he, one Alex Major and the defendant (p.187). Alex Major was absent on November 19. He, Bunnicelli, prepared Major's proof sheet "with Millie Borrás" and he submitted his own proof sheet and Major's to the defendant. He did not substitute any proof sheets, change any figures, falsify any forms (p.187); nor did he ever use another teller's cash drawer, "Not at this Bank." (p. 188). He never used another teller's stamp. Asked whether he was given instructions about what to do with his stamp and his cash drawer, he said "supposed to lock it up." (p. 188).

On cross examination he was asked whether he ever used another teller's machine and he said "only when they're out, we have to get their totals for their machines." (p.188). He described the procedure used by the tellers in proving their work. (p.189). He was shown a hand stamp and was asked whose it was. He said he couldn't tell because the number is all "blotched out". On one exhibit shown him, he said the number appeared to be a 1. He couldn't see any 1's on any other cards shown him; nor did he know which tellers stamped those cards up. (p. 192).

SUMMATION BY COUNSEL FOR THE DEFENDANT

After summation by counsel for the Government, counsel for the defendant addressed the jury.

Counsel called attention to the failure of the Government to locate the teller Alex Major and bring him in as a witness to testify "that he had nothing at all to do with any missing funds". He commented also on Mr. Bunnicelli's denial that he ever used the defendant's machine and his denial that he ever embezzled any funds from the Bank. Counsel stated, in part (p.209), "Do you think Mr. Bunnicelli would say that he did something if he did do it? No one is accusing him of it. But he certainly, if he did have anything to do with it, was not going to make any admissions. He would be a foolish young man if he did."

After the summation by the assistant United States Attorney, the Court charged the jury, in part instructing them as follows:

"Mr. Kaplan, as attorney for the defendant, said that the other teller, Joseph Bunnicelli, may have been the thief. He didn't say it directly and he didn't accuse him of it, but it is there. It would be naive to understand his remarks in the closing

summation as meaning anything else. If I recall correctly, he said, "Would Bunnicelli say it if he did it? I'm not saying he did it. But he would be a foolish young man if he did."

Well, now, what does that man, ladies and gentlemen? What does it mean? It means that an accusation is being made against the other teller. You've got Bunnicelli's testimony before you that he never committed this theft. You have the testimony of Delores Canty saying she never did it. But you have the overwhelming testimony in the case which should lead you to believe that \$20,300. left the coffers of this bank. And you've got to decide whether you heard the truth from Bunnicelli or whether you heard it from the defendant. Because, depending on how decided that issue, it will take you a long way in the direction of deciding other issues in the case."

The jury found defendant guilty of all 3 counts in the indictment.

The Court set May 20 as the sentencing date after the following colloquy:

"THE COURT: Mr. Kaplan, you have, of course, a right to entertain your own views with respect to this defendant's responsibilities, but on the basis of the jury's verdict she is no longer entitled to the presumption of innocence and the implication is very clear that she maintains custody of \$20,300 of the

bank's money that she shouldn't have, and it is never too late for her to make amends.

But if she continues to pursue this false and intransigent attitude of hers, I will have to take that into consideration at the time of sentence and construe that to be a wilful flouting of the law.

I cannot sit here passively and permit this defendant or any other defendant to flout the law and make crime pay. Crime doesn't pay. She put in what I consider to be an utterly, I would say, unpersuasive defense, and the jury apparently believed that it wasn't persuasive. I use the word "unpersuasive" advisedly in order to avoid using stronger adjectives.

But, be that as it may, it is behind us now and she has been found guilty, and I hope that she will see fit to correct a situation that should never have occurred.

MR. KAPLAN: Would your Honor consider the same bail conditions? I will talk to her. And I might say for the record, your Honor, that I've talked to my client throughout this whole trial and before the trial began, and I will talk to her again, if your Honor please.

THE COURT: In all my years on the bench, and I've had many cases involving false entries and misapplication of funds and embezzlement by bank officers and employees, this is the only one I can remember where they stood trial in the face of overwhelming evidence, the only one I could remember, and in a way a shocking defense, which cast the blame on an entirely innocent person."

On the day of sentence, counsel for the defendant stated to the Court that defendant continues to protest her innocence of the crimes for which she was convicted, that she did not steal any money from the bank and does not have any money with which to make restitution.

The Court then stated:

" I have no choice except to impose what I consider to be a punitive sentence in the hope that perhaps you will change your mind, because the law abiding community and the government which insured this money is a loser. Somebody has to make up for the absence of this money and the innocent people have to make up for it. You are an intelligent girl who has been given the benefit of a good education. You come from a poor background. It is a pity that you should be here in this court today facing this sentence, and I feel very sorry for you. I wish that I could show the clemency that your attorney asks for but I cannot in good conscience take any view of this case other than that you are the embezzler and that you have no repentance whatever with respect to this matter.

Am I correct, Mr. Rosenthal, in understanding that the maximum penalty on each count is \$5000 fine or five years in jail?

MR. ROSENTHAL: Yes, it is, your Honor.

THE COURT: I sentence you to four years imprisonment on Count 1 and the payment of \$5000 fine.

I sentence you to four years imprisonment on Count 2 and the payment of \$5,000 fine.

I sentence you to four years imprisonment on Count 3 and the payment of \$5,000 fine.

I direct that the prison sentences be served concurrently. "

POINT I

THE COURT'S COMMENT IN ITS CHARGE TO THE JURY UPON A PORTION OF THE DEFENDANT'S COUNSEL'S SUMMATION CONSTITUTED ERROR SINCE IT TENDED TO DEPRIVE THE DEFENDANT OF AN ADJUDICATION BY THE JURY OF HER GUILT OR INNOCENCE UPON ALL THE EVIDENCE IN THE CASE, NOT JUST UPON A PORTION OF IT.

On November 12 and November 19, 1974, the date on which defendant allegedly committed the crimes for which she stands convicted, there were three tellers in the Bank's employ, one Joseph Bunniceilli, one Alex Major and the defendant. The Government's case consisted of documentary evidence intended to show that, by making false entries on the record of her transactions, that is to say her proof sheet for November 12; by making false entries on a combined proof sheet on November 19, based upon her own and the other two tellers' proof sheets for that date, she covered up her embezzlement of \$20,300 in cash from the Bank on November 12, 1974.

Among the Government's exhibits was (1) - a tape from the teller's machine assigned for use by the defendant, (2) - checks processed through her machine bearing the #1 which was the number assigned to the defendant and (3) -

cards bearing the same hand stamp #1. The checks and cards represented deposits made by customers for certain taxes owed by them for transmittal to the United States Government through the Bank. One of the questions litigated at the trial was whether the teller's machine assigned to the defendant, machine #1, and whether the hand stamp bearing #1 could be used by either of the other two tellers. Another question was whether only the defendant had access to her cash drawer. The teller, Bunnicelli, testified at the trial (A1 - A9). It appeared that the teller, Alex Major, was absent on November 19, the date on which the defendant allegedly made false entries on the combined teller's proof sheet. His proof sheet for that date was prepared by Bunnicelli with the help of another employee and submitted it to the defendant in connection with her preparation of the combined proof sheet on November 19 (A3), Major was not called as a witness.

On direct examination, Bunnicelli testified that he never substituted any proof sheets, changed any figures, falsified any forms on November 19; nor did he ever use

another teller's cash drawer or hand stamp (A1). His instructions were to lock up his stamp and his cash drawer. He never stole \$20,300 cash on November 12 and November 19.

On cross examination he said that he only used another teller's machine when that teller was absent. He said that if another teller came over and wanted to use the defendant's machine, he would not be aware of it. He was shown the cards which accompanied the tax deposits by the customers and he was asked whose hand stamp they bore. He said that the numbers were "blotched out". One card had what appeared to be an unclear top part of a number 1. He could not see any other 1's on any of the other cards, nor did he know which teller stamped up those cards (A8).

In his summation, counsel for the defendant commented upon the failure of the Government to call the teller, Alex Major.

"But Miss Vincent was very quick to say yes, the stamp made on the card belonged to Miss Canty's hand stamp. This is the type of witness Miss Vincent, in my opinion, appeared to be. She was a very cooperative witness. But with all the witnesses, with all the witnesses, the one witness they didn't produce was Steve Major.

Now, Mr. Rosenthal may very well say, 'Well, Steve Major wasn't present on that particular day,' and they had Irving King come in and testify to that effect, and you will remember that punch card that he used.

Well, you see, this is a bank, and a bank, in my opinion, shouldn't be making any errors.

And when this punch card read November 22 and the 2 was written over with ink, you can draw your own conclusions. If that's the way your bank is run, take your money out of the bank.

The best witness would have been Mr. Major. And if Mr. Rosenthal says, 'Well, we couldn't locate Mr. Major,' then I tell you that there is no witness in this world that the U.S. Government cannot locate if they want to locate them. Let Mr. Major come in here and let him testify, let him testify that he had nothing at all to do with any missing funds. Until that testimony is given to this Court, I submit that Mr. Rosenthal has not established Miss Canty's guilt beyond a reasonable doubt."

Counsel then commented upon Bunnicelli's testimony.

" Now, Miss Canty said that someone else can use her machine. Mr. Bunnicelli said no. Mr. Rosenthal asked Mr. Bunnicelli, " did you embezzle the funds?" Well, you know, let's face it. Do you think Mr. Bunnicelli would say that he did something if he did do it? No one is accusing him of it.

But he certainly, if he did have anything to do with it, wasn't going to make any admissions. He would be a very foolish young man if he did. And I am not saying that he didn't. What I am saying, ladies and gentlemen, is that after all the evidence and after all the exhibits that appeared in this courtroom and after all the questions asked of this defendant, and may I say this with all due respect to his Honor, the questions asked by the Court have no greater significance, no greater weight than the questions asked by Mr. Rosenthal or myself, and that should not enter into your determination in deciding the guilt or innocence of this defendant."

The Court charged the jury in part as follows:

" Mr. Kaplan, as attorney for the defendant, said that the other teller, Joseph Bunnlicelli, may have been the thief. He didn't say it directly and he didn't accuse him of it, but it is there. It would be naive to understand his remarks in the closing summation as meaning anything else. If I recall correctly, he said, "Would Mr. Bunnlicelli say it if he did it? I'm not saying he did it. But he would be a foolish young man if he did."

Well now, what does that mean, ladies and gentlemen? What does it mean? It means an accusation is being made against the other teller. You've got Bunnlicelli's testimony before you that he never committed this theft. You have the testimony of Delores Canty saying she never did it. But you have the overwhelming testimony in the case which should lead you to

believe that \$20,300 left the coffers of this bank. And you've got to decide whether you heard the truth from Bunnicelli or whether you heard it from the defendant. Because, depending on how you decide that issue, it will take you a long way in the direction of deciding other issues in the case. (Emphasis supplied).

The defendant was an experienced teller. She had worked for two other banks before working for this bank and she has by her own testimony implied, although she said it never occurred in her experience, that perhaps the basic documents here are misleading because her hand stamp may have been used by somebody else or her teller's machine may have been used by somebody else. You've got to consider that and ask yourself; Was her hand stamp ever used by anybody else? Was her teller's machine ever used by anybody else except by her? Because, depending upon how you answer those questions those answers will take you a long way in the direction of resolving the basic issues in the case."

The rule is that a trial judge must, in his charge, confine his remarks to what is disclosed by the evidence. He cannot convey to the jury his personal reaction regarding the credibility of witnesses or the merits of the case; nor can he be argumentative for one side or the other.

(Quercia v. U.S., 289 U.S. 466; Billeci v. U.S., 194 F 2d 394). It has been held that in a criminal case, even when no reasonable juror can find a verdict of not guilty, the jury is entitled, under the rule of mercy, to find the defendant not guilty without pressure from the Court.

(U.S. v. Murdock, 290 U.S. 389; U.S. v. Woods, 252 F 2d 334).

The Court's power to comment on the evidence must be exercised in consonance with the constitutional guarantee of the right to trial by jury. (Billeci v. U.S., Supra). When the analysis of evidence takes the form of partisan argument, or is so prejudicial that the jury might feel that it is bound by the judge's remarks, it has been held that the party on trial has been deprived of the right to a trial by jury. (Wallace v. U.S., 291 F 2d 168; (Sevens v. US, 306 F 2d 834; Cook v. U.S. 18 F 2d 50; Myers v. George, 271 F 2d 168).

Bearing the above principles in mind, it is respectfully submitted that the foregoing instruction by the Court constituted error requiring a reversal of the judgment of conviction. The comment and intimation by defendant's counsel in his summation regarding the possibility that someone other than the defendant could have used her teller's machine and that that someone could possibly be Bunnicelli, although "no one is accusing him of it". was fair argument, considering all the evidence in the case and the counsel's duty to defend with zeal. Counsel also

made much of the failure of the Government to produce Alex Major as a witness at the trial and this also was permissable argument, warranted by the evidence. Indeed the Court didn't criticize defendant's counsel for his reference to the failure of the Government to call witness Major. The Court confined his criticism of counsel solely to his comments upon testimony of the witness Bunnicelli. The Court did so in language which was patently argumentative in favor of the Government. The jury was in effect told that if they believe that Bunnicelli was not the thief, then they must perforce find that defendant was the thief. Such an instruction, coming from the Court, was highly prejudicial. Conceivably, the jury could have felt bound by the judge's remarks, and this, as indicated in the cases cited hereinabove, had the effect of depriving the defendant of the adjudication of her guilt or innocence by the jury, not by the Court alone.

Moreover, it deprived her of an adjudication based upon all the evidence in the case, not alone upon the narrow issue whether she or Bunnicelli was the thief.

POINT II

THE SENTENCE IMPOSED UPON THE DEFENDANT
WAS EXCESSIVE

It is true that, generally, the imposition of a sentence lies within the sound discretion of the trial judge. There are, however, certain guidelines which should be followed.

It has been said that the purpose of sentence combines community protection, correction, rehabilitation, deterance and punishment.

It is respectfully submitted that, in the present case, the sentence imposed upon the defendant was harsh and excessive.

After the jury brought in its verdict, in considering whether defendant should be continued on bail before sentence, the Court expressed great displeasure with the defendant's choice of proceeding to trial rather than pleading guilty: (A 51).

"THE COURT: In all my years on the bench, and I've had many cases involving false entries and misapplication of funds and embezzlement by bank officers and employees,

this is the only one I can remember where they stood trial in the face of overwhelming evidence, the only one I could remember, and in a way a shocking defense, which cast the blame on an entirely innocent person."

On the day of sentence, the Court addressed the defendant as follows: (A 54)

"So we stand here today with the sad factual situation facing me that here you are a teller, found guilty of having embezzled this large sum of money, having put in as a defense that you don't know what happened to it and that maybe one of two other tellers took the money. The jury heard all that and they decided against you, and I have no choice except to regard you as a person responsible for this embezzlement, unwilling to admit it, and legally guilty of this crime.

I have no choice except to impose what I consider to be a punitive sentence in the hope that perhaps you will change your mind, because the law abiding community and the government which insured this money is a loser. Somebody has to make up for the absence of this money and the innocent people have to make up for it. You are an intelligent girl who has been given the benefit of a good education. You come from a poor background. It is a pity that you should be here in this court today

facing sentence, and I feel very sorry for you. I wish that I could show the clemency that your attorney asks for but I cannot in good conscience take any view of this case other than you are the embezzler and that you have no repentance whatever with respect to this matter.

Am I correct, Mr. Rosenthal, in understanding that the maximum penalty on each count is \$5000 or five years in jail?

MR. ROSENTHAL: Yes, it is, your Honor.

THE COURT: I sentence you to four years imprisonment on Count 1 and the payment of \$5000 fine.

I sentence you to four years imprisonment on Count 2 and the payment of \$5000 fine.

I sentence you to four years imprisonment on Count 3 and the payment of \$5000 fine.

I direct that the prison sentences be served concurrently."

The Court undoubtedly had a pre-sentence investigation and report of the defendant indicating that, although she came from a poor background, she was intelligent, well educated and without any prior criminal record. Defendant had been employed as a bank teller by several banks over a period of five years before she had come to work at Central State Bank. She had found other employment at the time of sentence. Examined in the light of the criteria

to be used as a guide in the sentencing process, it would seem clear that in the present case defendant is not in need of correction or rehabilitation. The community in general would in no way be endangered if she were not incarcerated. The ordeal surrounding her indictment, trial, sentence and present incarceration will, in all probability, sufficiently deter her from ever committing any criminal act.

The sole reason given by the Court for the stated "punitive sentence" was defendant's lack of penitence and failure and/or refusal to return the money allegedly embezzled by her, (the latter, in spite of defendant's continued persistent denial to date that she ever stole any money from the bank).

In this connection, it is to be noted that her criminal record will forever bar her from employment not only in the area where she was trained and experienced but in other fields where she would normally qualify.

The harsh sentence imposed, it is submitted, constituted an abuse of discretion.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE
REVERSED AND A NEW TRIAL GRANTED. FAILING THAT,
THE SENTENCE SHOULD BE MODIFIED, CONSONANT WITH
THIS COURT'S DISCRETION IN THE MATTER.

Respectfully submitted,

LEONARD H. KAPLAN
Attorney for Defendant-Appellant
Office & P.O. Address
44 Court Street
Brooklyn, New York 11201
Tel. No. UL 8-3718

Received ² copies of the within
Brief in behalf of Appellant, Volaris E. Cortez
this 3rd day of June, 1975.

Sign: John J. Gaud ~~III~~ AUSA

For: Paul J. Curran Esq(s).

Att'ys for Appellee

